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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 19–21), in denying the Government's motion to dismiss the complaint for lack of jurisdiction, is reported in 10 F. Supp. 412. The opinion of the Circuit Court of Appeals (R. 29–33) is reported in 89 F. (2d) 614.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 19, 1937. (R. 34.) The petition for writ of certiorari was filed July 15, 1937, and granted October 11, 1937. (R. 35.) The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a suit on a contract of war risk term insurance was "brought" in time under the provisions of Section 19 of the World War Veterans' Act, 1924, as amended, in the absence of compliance with any of the requirements of Sections 5 and 6 of the Tucker Act within the statutory period of limitations for bringing such suits.

2. Whether the United States has waived the defense that the instant suit was not filed in time.

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 28–31.

STATEMENT

This is an action by the petitioner, Leo N. Munro, in the District Court of the United States for the Western District of New York, upon a contract of war risk term insurance. (R. 5–7.) It is conceded in petitioner's brief (p. 2) that this action was barred by the limitations provision of Section 19 of the World War Veterans' Act, 1924, as amended (*infra*, p. 28), unless "brought" on or before July 1, 1933.

On March 16, 1933, petitioner filed a praecipe for the issuance of a summons in the office of the Clerk of the District Court. On the same day, a summons was issued, pursuant to the praecipe, a copy

of the summons was served upon the United States Attorney at Buffalo, New York, and another copy sent by registered mail to the Attorney General in Washington, D. C. (R. 1, 2, 4–5, 6, 14–15). On July 26, 1933, a copy of the complaint was served for the first time on the United States Attorney (R. 5–7, 9, 11). In his complaint petitioner sought to recover monthly benefits under a contract of war risk term insurance on account of total and permanent disability alleged to have existed at the time of his discharge from the military service on June 25, 1919. (R. 5, 6.) The complaint itself, however, was not filed in court until April 23, 1936, after the trial (R. 3), and although counsel for the petitioner stated in an affidavit (R. 11) and testified (R. 16) that a copy of the complaint was mailed to the Attorney General, there is no evidence that this was done by registered mail, as required by Section 6 of the Tucker Act (*infra*, p. 30).[1] There is, furthermore, no evidence of compliance with the fourth requirement in Section 6 that an affidavit of service be filed with the Clerk of the court.

On February 15, 1934, the United States Attorney filed an answer to the merits on behalf of the Government (R. 2, 7–8), and, on or about November 16, 1934, moved to dismiss the complaint for want of jurisdiction, upon the ground that suit

[1] The Circuit Court of Appeals stated in its opinion (R. 31): "Indeed, the requirement that a copy of the petition be mailed to the Attorney General does not appear to have been complied with at any time * * *."

upon the claim was barred under Section 19 of the World War Veterans' Act, 1924, as amended (R. 8–9, 12), the complaint or petition not having been filed in the District Court and served upon the United States Attorney until after July 1, 1933.

Petitioner's attorney thereupon filed an affidavit to the effect, in part, that the procedure followed by him in attempting to bring suit had been approved by an Assistant United States Attorney, who had assured him that it would be sufficient to give the District Court jurisdiction and toll the statute of limitations. (R. 10–12.)

On April 11, 1935, the Government's motion to dismiss was denied by District Judge Rippey (R. 19–22), who delivered an opinion holding that, under the Conformity Act, *infra*, p. 31, the issuance by the Clerk of the summons and its service according to State practice constituted the bringing of suit within the meaning of Section 19 of the World War Veterans' Act, 1924, as amended; that, in any event, the question whether the suit was brought within the time limitation prescribed by Section 19 constituted an affirmative defense; that the provisions for bringing the Government into court contained in the Tucker Act [2] were procedural and not jurisdictional, and that in consequence the defense of limitations, together with any

[2] Under Section 19 of the World War Veterans' Act, *infra*, p. 28, Sections 5 and 6 of the Tucker Act, infra, pp. 29–31, are expressly made applicable to suits upon contracts of war risk insurance.

procedural defects upon which such defense might be based, were waived by the Government's general appearance and answer to the merits (R. 19–21).

The case was tried before District Judge Knight and a jury on April 9, 1936 (R. 3.) The evidence included testimony by petitioner's attorney which was substantially to the same effect as his affidavit previously filed in opposition to the motion to dismiss for lack of jurisdiction (R. 13–17.) At the close of petitioner's case, the Government again moved to dismiss the action on the ground that suit had not been commenced in time, and the motion was denied. The motion was renewed at the conclusion of the entire case and was again denied, exception being noted to this ruling (R. 19.) A verdict was rendered for petitioner, and judgment was entered thereon July 29, 1936 (R. 3, 22–23.) An appeal was taken September 3, 1936 (R. 23–24), assigning error separately to the several denials of the motions to dismiss (R. 24–25). All of the proceedings pertinent to these motions were incorporated in a timely bill of exceptions (R. 8–19, 25–27.)

The Circuit Court of Appeals for the Second Circuit unanimously reversed the judgment of the District Court for the reasons, as stated in its opinion (R. 29–33), that the provisions of Sections 5 and 6 of the Tucker Act, requiring that a petition "shall" be filed and a copy thereof served upon the United States Attorney and mailed to the Attor-

ney General,[3] are mandatory and exclusive of State practice under the Conformity Act in suits like the present one; that such a suit could not be deemed to have been brought at least until a copy of the petition had been served upon the United States Attorney; that the suit was barred because neither this nor any of the other requirements of the Tucker Act were complied with until after the expiration of the time limitation prescribed by Section 19 of the World War Veterans' Act, 1924, as amended; and that petitioner's failure to bring his suit in time was not waived by the assurance of the Assistant United States Attorney that service of summons would toll the statute of limitations, or by the filing of an answer to the merits, since the time limitation is a condition of the court's jurisdiction over the subject matter of the action, and cannot be waived. Decisions relating to waiver of matters of venue were held to be not in point.

SUMMARY OF ARGUMENT

I

Suit was not "brought" by the petitioner within the time permitted by Section 19 of the World War Veterans' Act, 1924, as amended. That section by reference to Sections 5 and 6 of the Tucker Act provides the only procedure for the commencement

[3] The opinion omitted any reference to the fourth requirement that an affidavit of service and mailing be filed with the clerk.

of suit effective to stop the running of the limitation contained therein. Petitioner failed to take any of the steps required by those sections until after the period of limitation for bringing suit had expired, but contends that a service of summons on the United States Attorney during the limitation period constituted the commencement of a suit under the local practice act which, he claims, was applicable by virtue of the Conformity Act, to suits against the Government under the World War Veterans' Act. We submit that this contention is without merit.

(1) Sections 5 and 6 of the Tucker Act provide procedure which is simple and comprehensive in scope and includes steps which are manifestly sufficient to constitute the commencement of an action, effective to toll limitations. It would, therefore, seem reasonable to conclude that Congress intended to provide that such procedure should constitute the commencement of an action. This conclusion is further justified by the fact that the Tucker Act contains both a time limitation and procedure sufficient to toll it. That such procedure was intended to be exclusive is evident from the fact that the provisions for it are mandatory. (2) The provisions in question were obviously intended for the protection of the United States, which would be denied or impaired if procedure other than that provided for could be invoked as a means of commencing an action so as to toll limitations. (3) It is submitted that procedural steps legally effec-

tive for bringing a defendant into court must be taken before the limitation period can be considered to have been tolled, and since the sole means of bringing the United States into court is found in the Tucker Act, the limitation has not been tolled where, as here, none of the provisions of that Act have been complied with in time.

II

The Government has not waived the defense that the suit was not brought in time. Under the rule of strict construction applicable to all statutory waivers of the Government's sovereign immunity from suit, it has been held that the time limitations contained in Section 19 of the World War Veterans' Act, as amended, and other statutes giving consent to sue the Government, being intended for the protection of the Government, are conditions to the jurisdiction of the court and cannot be waived. But whether the limitation in Section 19 goes to the jurisdiction of the court or is an element of substantive right is immaterial since limitations of the latter kind are not subject to waiver.

It is equally clear that the United States Attorney and his assistant had no authority to make the service of summons in the instant case effective to toll the time limitation. The procedural requirements in the Tucker Act like the limitation provisions are provided for the protection of the Government and unless the interests of the Government might be protected or furthered thereby, as

in the waiver of venue, they may not be waived. Certainly to allow waiver of such requirements would be inconsistent with the evident desire of Congress for uniformity of procedure. Moreover, if United States Attorneys were authorized to make service of summons or other void proceedings effective to interrupt the period of limitations, the United States would lose the protection afforded by the provisions of the Tucker Act against the possible nullification of the time limitation in the event the United States Attorney should be derelict in his duty. Even if it were to be assumed that compliance with the requirements which had not already been met, were waived by the filing of the general appearance and answer to the merits on behalf of the Government, such waiver would be ineffective to restore petitioner's privilege of suit which was lost with the expiration of the limitation period.

ARGUMENT

I

SUIT WAS NOT "BROUGHT" BY THE PETITIONER WITHIN THE TIME PERMITTED BY SECTION 19 OF THE WORLD WAR VETERANS' ACT, 1924, AS AMENDED

Section 19 of the World War Veterans' Act, 1924, as amended (*infra*, p. 28), confers the privilege of suit against the United States on a contract of war risk insurance in the event of disagreement between the claimant and the Veterans Administration, but provides that no suit may be al-

lowed unless "brought" within a specified period of time.

It further expressly provides that the procedure in such suits shall be the same as that provided in Sections 5, 6 and 10 of the Tucker Act (*infra*, pp. 29–31), in so far as such procedure may be applicable. Sections 5 and 6 of the Tucker Act provide, specifically, that the plaintiff "shall" (1) file a petition, duly verified, with the Clerk of the court in the district where the plaintiff resides, which shall contain his name and residence, the nature of his claim, and the facts upon which it is based, the damages sought to be recovered, and a prayer for judgment (Section 5); (2) serve a copy of the petition upon the United States Attorney; (3) send a copy to the Attorney General by registered mail; and (4) file with the Clerk an affidavit of such service and mailing; that upon service of a copy of the petition upon the United States Attorney he shall be under the duty "to appear and defend the interests of the government" by a plea, answer, or demurrer within sixty days thereafter, unless the time be extended by order of the court; and that, in default of such defense, the plaintiff may proceed with the case under such rules as the court may adopt, but not have judgment unless he shall establish his claim by proof satisfactory to the court (Section 6). It is significant that the provisions relating to the proceedings required of the plaintiff are expressly mandatory.

Petitioner does not dispute the fact that he failed to meet any of the requirements of Sections 5 and 6 of the Tucker Act until he served a copy of his complaint on the United States Attorney after the period of limitation upon bringing suit had expired. (Pet. Br. pp. 2–3.) Indeed, the complaint itself was not filed until after the verdict (R. 3), and petitioner has not, at any time, met the other requirements that a copy of the petition or complaint be sent by registered mail to the Attorney General and that an affidavit as to the service and mailing be filed with the Clerk of court. He contends, however, that the provisions of the Civil Practice Act of New York for commencing an action merely by service of a summons, were intended by Congress to be applicable by analogy, under the Conformity Act (*infra,* p. 31), to suits against the United States under Section 19 of the World War Veterans' Act, 1924, as amended, and hence, that he "brought" suit in time by the service of the summons on the United States Attorney.

We submit that petitioner's contention is without merit. It is the view of the Government that Section 19 of the World War Veterans' Act, 1924, as amended, by expressly adopting the provisions of Sections 5 and 6 of the Tucker Act, provided the only procedure for the commencement of suit, effective to toll the limitation contained in that section.

1. Sections 5 and 6 of the Tucker Act, which is entitled "An Act to provide for the bringing of

suits against the Government of the United States", provide procedure which is simple and comprehensive in scope and includes steps which are manifestly sufficient to constitute the commencement of an action effective to toll limitations. The procedure provided is not only effective to docket the suit and inform the Government of the cause of action, but also to bring the United States into court and compel it to make defense or suffer judgment by default (if the claim shall be established). It seems reasonable to conclude that by including provisions for procedure sufficient to constitute the commencement of an action among provisions so simple and comprehensive in their nature as those contained in Sections 5 and 6, Congress intended to provide that such procedure should constitute the commencement of an action. Moreover, the Tucker Act includes in itself a limitation upon suits [4] and it would seem reasonable to assume that where an Act contains both a limitation and provision for procedure sufficient to toll the limitation, such procedure was intended to have that effect. That Sections 5 and 6 were intended to provide the exclusive procedure for commencing an action against the United States is evident also

[4] Section 1, paragraph second, of the Tucker Act (24 Stat. 505; U. S. C., Title 28, Sec. 41 (20) provided:

"That no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."

from the fact that provisions for such procedure are mandatory.[5]

2. The provisions in question were obviously intended for the protection of the United States, which would be denied or impaired if procedure other than that provided for could be invoked as a means of commencing an action so as to toll limitations. In the debate upon the bill which became the Tucker Act, it was stated by Mr. Tucker that protection of the United States against possible neglect or default upon the part of the United States Attorney was the purpose of the provision for the mailing of a copy of the petition to the Attorney General. (Cong. Rec., Vol. 18, Part 1, p. 623.) Clearly this was also the purpose of the requirement that the plaintiff establish his claim by proof satisfactory to the court where no defense has been interposed by the United States. Furthermore, full protection to the United States would be denied if there were substituted for the uniform practice provided in the Tucker Act itself the varying practices in the several states. The numerous individuals and agencies concerned with the consideration and preparation of cases to which the Government might be a party defendant would not ordinarily be familiar with these different prac-

[5] Since petitioner failed to comply in time with any of the provisions of the Act, it is unnecessary to consider which of them must be complied with in order to toll the period of limitations, or whether compliance with all of them is required for that purpose.

tices, with the result that the Government's interests might often be impaired. Moreover, under the practice prevailing in many jurisdictions, insufficient time might be allowed for such consideration and preparation. Cf. *United States* v. *Lindholm*, 79 F. (2d) 784, 787.

Furthermore, if it were permissible to invoke local procedure for the commencement of an action, it would be possible for a negligent United States Attorney to nullify the protection afforded the Government in the limitation provision. Local procedure, ineffective to bring the United States into court, as hereinafter developed (*infra*, pp. 14–18), could nevertheless be relied upon to toll limitations and thus allow a claimant to preserve his claim by invoking such procedure and to prosecute it later when it might better suit his purpose. Such a situation would manifestly be avoidable if the provisions of the Tucker Act should be complied with, since the Attorney General would have notice of the proceedings.

3. It is submitted that procedural steps effective for bringing a defendant into court must be taken before the limitation can be considered to have been tolled, and since the sole means of bringing the United States into court is found in the Tucker Act, the limitation has not been tolled where, as here, none of the provisions of that Act have been complied with in time.

It has been generally held that the statute of limitations is not tolled unless procedural steps

have been taken which are legally effective for bringing the defendant into court. In *United States* v. *American Lumber Co.*, 80 Fed. 309, affirmed, 85 Fed. 827 (C. C. A. 9th), it was held that the statute limiting the time within which suits might be "brought" by the United States to cancel land patents was not complied with by invoking an invalid process even though done in good faith upon the mistaken assumption that the process was valid. The lower court stated, referring to the general rule as to when an action is commenced so as to toll a statute of limitations (p. 316):

> "* * * the action, while it may be deemed 'commenced' or 'brought', so far as the plaintiff is concerned, when the complaint is filed, is not considered 'commenced' or 'brought' *so far as the defendant is concerned,* so as to stop the running of a statute of limitations, until legal steps have been taken to make him a party by suing out the appropriate process and making a *bona fide* effort to serve the same." [Italics ours.]

And, in the opinion of the Circuit Court of Appeals, it is further said (p. 831):

> It does not aid the *bona fides* of the attempt to serve that the appellant's counsel thought that the subpoenas could be legally served by the persons to whom they were sent. It is immaterial what may have been his belief or his opinion in that regard. The *bona fides* must be shown by proof that

> an effort was made to proceed according to law, and that use was made, or attempted to be made, of the *means which the law prescribes.* [Italics ours.]

See also *Fernekes* v. *Case,* 75 Iowa 152; *Jackson* v. *Brooks,* 14 Wend. (N. Y.) 649, 654; *Dorr's Admr.* v. *Rohr,* 82 Va. 359; *Brock* v. *Francis,* 89 Kans. 463; *Bacigalupo* v. *Superior Court of the City and County of San Francisco,* 108 Cal. 92; *Town of Woodville* v. *Town of Harrison,* 73 Wis. 360; *Jordan* v. *Bosworth,* 123 Ga. 879; *Maddox* v. *Humphries,* 30 Tex. 494; *Bates* v. *J. G. Smith & Bros.,* 80 Tex. 242; *Casey* v. *Newport Rolling Mill Co.,* 156 Ky. 623; *J. Cushing Co.* v. *Brooklyn Trust Co.,* 235 Mass. 171; *Angell on Limitations,* 6th Ed., Section 312; *Wood on Limitations,* 1st Ed., 1883, and 2d Ed., 1893, Section 289.

Furthermore, the Tucker Act provides the only procedure for bringing the United States into court. It is well settled that any conditions attached by Congress to the privilege of suing the United States must be strictly complied with (*Nichols* v. *United States,* 7 Wall. 122, 126; *Schillinger* v. *United States,* 155 U. S. 163, 166; *Price* v. *United States,* 174 U. S. 373; *Eastern Transp. Co.* v. *United States,* 272 U. S. 675, 686; *United States* v. *Michel,* 282 U. S. 656, 659), and that this rule applies to the procedure to be followed (*McElrath* v. *United States,* 102 U. S. 426; *Reid* v. *United States,* 211 U. S. 329, 538), even as to purely formal matters (*Rock Island R. R.* v. *United States,* 254 U. S. 141, 143). Moreover, the principle is well

established that where Congress has prescribed definite rules governing any matter of procedure or practice in the United States courts, such rules are to that extent exclusive of local rules of practice and procedure relating to the same matter which might otherwise be applicable under the Conformity Act. (*Southern Pacific Company* v. *Denton,* 146 U. S. 202, 209, and cases cited therein; *Mexican Central Railway* v. *Pinkney,* 149 U. S. 194, 206; *United States* v. *Lindholm,* 79 F. (2d) 784, 787.)

In *Reid Wrecking Co.* v. *United States,* 202 Fed. 314, 316 (E. D. Ohio), Mr. Justice Day, while a District Judge, in the course of an opinion granting motions to quash the process on the ground of want of venue, said of Section 6 of the Tucker Act:

> Section 6 of this act describes the manner of service or process which must be followed by plaintiffs in suits against the government in the District Court.

And accordingly it has been held in several decisions that a summons pursuant to local practice (as in the instant case) is ineffective as a means of bringing the United States into court. *National Casket Co.* v. *United States,* 263 Fed. 246 (S. D. N. Y.); *Cassarello* v. *United States,* 265 Fed. 326 (M. D. Pa.); *Miller* v. *United States,* 11 Fed. Supp. 924 (W. D. N. Y.). See also *Whelan Paper and Pulp Mills* v. *Davis,* 53 App. D. C. 84, 288 Fed. 438, 441.

In the absence, therefore, of clear language in the statutory provisions in question here, it could scarcely be presumed that Congress intended that a service of summons or other proceeding not among those specified in Sections 5 and 6 of the Tucker Act, although ineffective as a means of bringing the United States into court, should, nevertheless, constitute the commencement of an action effective to stop the running of the limitation period.

The Government's position that Congress intended the commencement of suit to be governed by Sections 5 and 6 of the Tucker Act is supported by several decisions holding that a suit is not "brought" so as to stop the running of limitations until a copy of the petition has been served upon the United States Attorney. (*Bates Manufacturing Co.* v. *United States* (C. C. A. 1st) decided December 8, 1937, not yet reported; *Walton* v. *United States,* 73 F. (2d) 15 (C. C. A. 8th); *Creasy* v. *United States,* 4 F. Supp. 175, 179; *Henry* v. *United States,* 15 F. Supp. 651. See also, *Spencer* v. *United tSates,* 14 F. Supp. 46, 47.) Moreover, in *Bachmann, Emmerich & Co.* v. *United States* (S. D. N. Y.) (decided June 4, 1935, unreported but published in 16 A. F. T. R. 1056 and 353–A. C. C. H., p. 9427), it was held that all of the requirements must be met.

4. Petitioner points to the fact that Section 19 of the World War Veterans' Act (*infra,* p. 28), in adopting the procedure in Sections 5, 6, and 10

of the Tucker Act, contains the qualifying clause "so far as applicable." It is submitted, however, that this clause was evidently intended only to refer to the provisions in Section 10 relating to the findings and opinion of the court, which are obviously inapplicable to war risk insurance cases tried before juries.

The provisions of Section 4 of the Tucker Act, as amended, to which petitioner also refers (Pet. Br. p. 8), afford no support for his contention. They (*infra,* p. 29) provide that "the course of procedure" for the District Courts shall be in accordance with "the established rules of said respective courts", but only "in so far as applicable and not inconsistent with" Sections 5 and 6. The inconsistency between a service of summons as a method of bringing suit and the procedure provided for that purpose in Sections 5 and 6 is apparent. Moreover, the fact that Section 4 was not among those adopted by Section 19 of the World War Veterans' Act indicates that it was not intended to be applicable to suits under the latter section in any event.

As indicating an intention by Congress that procedure in advance of the filing of the petition was contemplated, the petitioner also refers to that portion of Section 5 of the Tucker Act (*infra,* p. 29) which, as contained in Section 762, Title 28, U. S. C. reads:

> The plaintiff in any suit *brought* under the provisions of section 41, paragraph 20, of

> this title shall file a petition, * * *. (Italics ours.)

But the emphasis which the petitioner seeks to place upon the single word "brought" ignores the remainder of the clause from which it is taken. It is evident that the clause as a whole simply means that in suits to which the Act applies the specified conditions must be met, but if there were any ambiguity, the construction suggested by the petitioner is manifestly incorrect for the reasons already stated.

5. Two of the four District Court decisions cited by petitioner (Pet. Br. p. 10) were rendered by District Courts in the Second Circuit (*Bennett Day Importing Co.* v. *United States,* 8 F. (2d) 83 (S. D. N. Y.), and *Miller* v. *United States,* 13 F. Supp. 684 (W. D. N. Y.)), and were, therefore, overruled by the decision of the Circuit Court of Appeals of that Circuit in the case at bar. Moreover, the decision in the *Miller* case was rendered by the same District Judge who denied the Government's first motion to dismiss in the present case. Furthermore, it will be noted that the other two decisions (*Mill Creek & Minehill Nav. & R. Co.* v. *United States,* 246 Fed. 1013, and *Provident Trust Co.* v. *United States,* 17 F. Supp. 849), were both rendered by a single District Court.

A number of explanations have been offered of the *per curiam* affirmance on writ of error (251 U. S. 539–540) by this Court of the District Court's decision in the *Mill Creek* case, cited by petitioner

(Pet. Br. pp. 10, 13, 16, 17). Petitioner has offered three explanations (Pet. Br. pp. 16–17), and the court below a fourth, to the effect, in part, that this Court did not decide the question like the one involved here as to whether the United States had been properly brought into court before the statute of limitations had run (R. 32). We think the Circuit Court of Appeals has properly interpreted the case. The *per curiam* disposition of that case upon the authority of *United States* v. *Larkin,* 208 U. S. 333, implies that the question of limitations as to which review by this Court was sought was not within the scope of the statute providing for direct review, which had been construed in the *Larkin* case and, therefore, the affirmance in the *Mill Creek* case would not at all imply concurrence in the conclusion reached by the District Court on a question not involving the jurisdiction of the District Court *as a Federal court.*[6] Moreover, this view appears to be consistent with the fact that this Court's decision does not appear to have been cited on that question in any case so far, although the District Court's decision has been cited in several cases, and was followed in *Bennett Day Importing Co.* v. *United States, supra,* and *Provident Trust Co.* v. *United States, supra.*

[6] Cf. Brief for Defendant in the *Mill Creek* case, No. 103, 1919 Term, p. 19, 251 U. S. 539, citing the *Larkin* case to similar effect.

II

THE GOVERNMENT HAS NOT WAIVED THE DEFENSE THAT THE SUIT WAS NOT BROUGHT IN TIME

It is well settled that statutes waiving the Government's sovereign immunity from suit are to be strictly construed in favor of the United States (*Nichols* v. *United States,* 7 Wall. 122, 126; *Schillinger* v. *United States,* 155 U. S. 163, 166; *Price* v. *United States,* 174 U. S. 373; *Eastern Transp. Co.* v. *United States,* 272 U. S. 675, 686; *United States* v. *Michel,* 282 U. S. 656, 659) and it has been held that the limitation provisions contained in such statutes, being intended for the protection of the Government, are conditions to the jurisdiction of the court which cannot be waived. This rule has been held to be applicable to the limitation provision in Section 19 (*Lynch* v. *United States,* 80 F. (2d) 418, 419 (C. C. A. 5th), certiorari denied, 298 U. S. 658, rehearing denied, 298 U. S. 692; *United States* v. *Trollinger,* 81 F. (2d) 167, 168 (C. C. A. 4th); *United States* v. *Valndza,* 81 F. (2d) 615 (C. C. A. 6th); *Miller* v. *United States,* 57 F. (2d) 889, 890 (E. D. N. Y.) and to similar provisions as to suits in the Court of Claims (*Finn* v. *United States,* 123 U. S. 227; *DeArnaud* v. *United States,* 151 U. S. 483, 495–496; see also, *United States* v. *Wardwell,* 172 U. S. 48, 52) and in the District Courts under the Tucker Act (*Compagnie Generale Transatlantique* v. *United States,* 51 F. (2d) 1053, 1056 (C. C. A. 2d); *Carpenter* v. *United States,* 56 F. (2d) 828 (C. C. A. 2d)).

See also *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U. S. 638, 642, where a similar ruling was made as to like provisions in the Interstate Commerce Act. In *Tucker* v. *Alexander,* 275 U. S. 228, 232, it was said, in distinguishing time limitations on suits against the United States from certain provisions intended solely for the convenience of Government officials in the administration of a tax statute, that waivers of the former, if allowed, "would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist." See also *United States* v. *Chicago Golf Club,* 84 F. (2d) 914 (C. C. A. 7th).

But whether the time limitation on suits under Section 19 goes to the jurisdiction of the court, or is an element of substantive right (as seems to be intimated in *Lynch* v. *United States,* 292 U. S. 571, 587–588),[7] is immaterial, since limitations of the latter kind are not subject to waiver (*Central Vermont Railway* v. *White,* 238 U. S. 507; *Atlantic Coast Line Ry.* v. *Burnette,* 239 U. S. 199, cited in petitioner's brief, p. 12).

Ayers v. *Watson,* 113 U. S. 594, and *Burnette* v. *Desmornes,* 226 U. S. 145, cited by petitioner (Pet. Br. pp. 12, 13), are manifestly distinguishable on the ground that neither of the limitation provisions considered in those cases was an element of substantive right or related to suits against the Government. *United States* v. *Ellison,* 74 F. (2d) 864 (C. C. A. 4th), certiorari denied, 295 U. S. 750,

[7] Compare *Tyson* v. *United States,* 297 U. S. 121, 123.

also cited by petitioner (Pet. Br. p. 13), was a case in which lack of jurisdiction was held not to be disclosed by any facts before the appellate court, and it was apparently considered that the facts establishing jurisdiction had in effect been admitted. Moreover, the decision of the same court in the *Trollinger* case (81 F. (2d) 167), *supra,* shows clearly that it had no intention of holding that the time limitation upon bringing suit would be subject to waiver in a case like the one at bar, where the record affirmatively shows that the suit, if "brought" at all, was not brought in time.

Accordingly, it is clear that the United States Attorney had no authority to waive the requirements of Section 19 as to the time for bringing suit. It is equally clear that the United States Attorney and his assistant had no authority to make the service of summons in the instant case effective to stop the running of the limitation upon suit. The requirements as to procedure for bringing suit, contained in the Tucker Act, are, it is submitted, in the same class with the limitation provisions with respect to the matter of waiver. Like the latter, they are provided for the protection of the Government and unless the interests of the Government might be protected or furthered thereby, as in the waiver of venue, they may not be waived. It would manifestly have been contrary to the interests of the Government to make the venue requirement a condition which

could not be waived, since it might often be more advantageous to the Government to have the suit in a district other than that provided in the statute.

It would be difficult, however, to imagine circumstances under which a waiver of any of the other requirements would be more advantageous to the Government than strict compliance, or, indeed, circumstances under which it would not deprive the Government at least to some extent of the protection intended by Congress to be afforded by such provision. Certainly, to imply the existence of authority in the United States Attorney to waive such requirements would be inconsistent with the evident desire on the part of Congress for uniformity of procedure. Moreover, authority to render the service of a summons or other void proceeding effective to interrupt the running of limitations would cause the United States to lose the protection afforded by the provisions of the Tucker Act against possible nullification of the time limitation in the event the United States Attorney should be derelict in his duty. In short, it is submitted that no statements or conduct on the part of the United States Attorney or his assistant could possibly have conferred validity in any respect upon the service of summons. Moreover, even if it may be assumed that compliance with the requirements, not already complied with, was waived by the filing of the general appearance and answer to the merits on behalf of the Government,

such waiver, it is submitted, could not be effective to restore the plaintiff's privilege of suit, which was lost with the expiration of the limitation period. (*Henry* v. *United States,* 15 F. Supp. 651, *supra;* see also *Spencer* v. *United States,* 14 F. Supp. 46, *supra; Cassarello* v. *United States,* 355 Fed. 326, 328–329).

Farrar & Brown v. *United States,* 3 Pet. 458, cited by petitioner (Pet. Br. p. 15), is distinguishable. There the Attorney General failed to object to the entry of his appearance by the Clerk of the Supreme Court, pursuant to a long established practice, until a subsequent term, and it was held that he had waived the right to object, but the right waived was evidently not derived from a statute granting consent to sue the Government.

Law v. *United States,* 266 U. S. 494, cited by petitioner (Pet. Br. p. 16), is not in point. The suit there was brought under Section 13 of the War Risk Insurance Act, which preceded Section 19 of the World War Veterans' Act, 1924, and did not mention the Tucker Act. See *Crouch* v. *United States,* 266 U. S. 180, which is cited in the *Law* case as authority for the statement quoted by petitioner.

The portions of the opinion of *Lynch* v. *United States,* 292 U. S. 571, quoted by petitioner (Pet. Br. pp. 4–5), were made solely in connection with the holding in that case that war risk insurance policies are contracts creating vested rights. There is no suggestion in the opinion of an intention to

overrule or modify the holding in *United States* v. *Worley,* 281 U. S. 339, to the effect that the rules governing the rights and remedies incident to war risk insurance contracts were intended to be the same as those relating to any other contract entered into by the Government in its sovereign capacity.

Petitioner's contention that the Government is estopped to deny that a suit was commenced by service of the summons is opposed to the well established rule that the Government may not be bound by the acts of its officers or agents contrary to law. (*Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408–409, and cases cited; *Sutton* v. *United States,* 256 U. S. 575, 579.)

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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JANUARY, 1938.

APPENDIX

STATUTES INVOLVED

Section 19 of the World War Veterans' Act, 1924, as amended, as contained in Section 445, Title 38, U. S. C., provides:

> *In the event of disagreement as to claim,* including claim for refund of premiums, *under a contract of insurance* between the Veterans Administration and any person or persons claiming thereunder *an action on the claim may be brought against the United States* either in the Supreme Court of the District of Columbia or *in the district court of the United States* in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. *The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28,* and section 765 of Title 28 so far as applicable. * * *
>
> No *suit* on yearly renewable term insurance *shall be allowed under this section unless the same shall have been brought within six years after the right accrued* for which the claim is made *or within one year after July 3, 1930, whichever is the later date,* * * *: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the Veterans Administration of the claim sued upon and the denial of said claim

by the Administrator of Veterans' Affairs, * * * [Italics ours.]

Section 4 of the Act of March 3, 1887, commonly known as the Tucker Act, as amended, provides, as contained in Section 761, Title 28, U. S. C., as follows:

> The course of procedure for the district courts and the Court of Claims in cases under section 41, paragraph 20, and section 250 of this title, insofar as applicable and not inconsistent with sections 762 to 765, and the procedure prescribed for the Court of Claims shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

Section 5 of the Tucker Act, as contained in Section 762, Title 28, U. S. C., provides:

> *The plaintiff* in any suit brought under the provisions of section 41, paragraph 20, of this title *shall file a petition,* duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other things claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law. (Italics ours.)

Section 6 of the Tucker Act, as contained in Section 763, Title 28, U. S. C., provides:

> *The plaintiff shall cause a copy of his petition* filed under section 762 of this title, *to be served upon the district attorney* of the

United States in the district wherein suit is brought, *and shall mail a copy* of the same *by registered letter, to the Attorney General* of the United States, *and shall* thereupon *cause to be filed* with the clerk of the court wherein suit is instituted *an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made* as aforesaid *to appear* and defend the interests of the Government *in the suit and within sixty days after the service of petition upon him,* unless the time should be extended by order of the court made in the case *to file a plea, answer, or demurrer on the part of the Government,* and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. *Should the district attorney neglect or refuse to file the* plea, answer, demurrer, or *defense,* as required, *the plaintiff may proceed with the case under such rules as the court may adopt* in the premises; *but* the plaintiff shall *not have judgment* or decree *for his claim,* or any part thereof, *unless he shall establish the same by proof satisfactory to the court.* [Italics ours.]

Section 10 of the Tucker Act, as amended, provides, as contained in Section 765, Title 28, U. S. C., as follows:

When the *findings of fact and the law* applicable thereto have been filed in any case * * *, and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the Attorney General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony

taken, *the written findings of the court, and his written opinion* as to the same; * * *

R. S. Sec. 914, commonly known as the Conformity Act, as contained in Section 724, Title 28, U. S. C., provides:

> *Conformity to practice in State courts.*— The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding.